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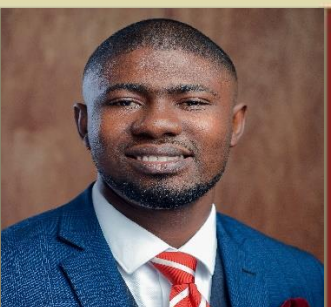
THE CONSTITUTIONAL BASIS FOR THE IMPOSITION OF CONSUMPTION TAXES BY FEDERAL AND STATE GOVERNMENTS IN NIGERIA: A CRITICAL ANALYSIS OF THE SUPREME COURT'S DECISION IN AG LAGOS v EKO HOTELS LTD & ANOR



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INTRODUCTION

Value Added tax (VAT), sales tax, and hotel occupancy and restaurant consumption tax[1] are forms of consumption taxes whose economic burden rests on the final consumer.

The constitutional basis for imposing consumption taxes has been challenged at several times in Nigeria. The controversies surrounding consumption taxes have raged between the Federal and State governments on one hand, and between government authorities and operators of businesses who act as collecting agents, on the other hand.[2]

On 8th December 2017, the Supreme Court of Nigeria upheld the 13th July 2007 decision of the Court of Appeal in ***Attorney-General of Lagos State v. Eko Hotels Limited & Anor***[3] which was to the effect that the VAT Act[4] has covered the field of the Sales Tax Law of Lagos State and therefore takes precedence until such a time when the federal legislature repeals the VAT Act. The Supreme Court also decided that it would amount to double taxation for two different laws to impose consumption tax twice on a consumer for the same good or service.

Coming from the apex court of the land, this decision ought to have resolved some of the controversies surrounding the VAT Act. However, it appears to have raised a set of issues that should be of concern to relevant stakeholders and tax practitioners. These issues include the effect of the decision on other extant sales and consumption tax laws in force in the States of the Federation; the applicability of the 'doctrine of covering the field' to the case; and the legal basis for the decision that the imposition of VAT and sales tax would amount to 'double taxation'.

Facts of the Case

In 2001, the Lagos State Internal Service (LIRS) demanded, from Eko Hotels Limited (Eko Hotels), remittance of money due as tax on sales to its customers. Prior to this time, Eko Hotels used to remit VAT to the Federal Board of Inland

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[1] This tax was introduced in Lagos State by the Hotel Occupancy and Restaurant Consumption Law of Lagos State, 2009

[2] Several suits have been filed by the Lagos State Government challenging the constitutionality of the VAT Act as a federal tax imposed on all qualifying goods and services consumed in all the States of the Federation. For instance, on 12th August 2009 in Attorney General of Lagos State v. The Attorney General of the Federation & Ors (2014) 6 CLRN 1; (2014), the Attorney General of Lagos State filed an originating summons against the Attorney General of the Federation and all the attorneys general of the States of the federation at the Supreme Court seeking a declaration that the VAT Act is unconstitutional because the National Assembly lacked the legislative competence to enact it pursuant to section 4 and Parts I and II of the 2nd Schedule to the Constitution of the Federal Republic of Nigeria, 1999 (the Constitution). The Supreme Court struck out the matter on the basis that it lacked original jurisdiction pursuant to section 232 CFRN (which limits the Supreme Court's original jurisdiction to disputes between the Federation and a State or between States) , and thus did not decide the action on its merit.

[3] (2017) 12 SC (Part 1) 107. The FIRS was the 2nd Respondent in the appeal.

[4] Formerly Decree No. 102 of 1993.

Revenue (FBIR); however, the LIRS insisted that Eko Hotels was not exempted from collecting and remitting taxes under the Sales Tax Law.

On 5th March 2004, Eko Hotels filed a suit against both the Attorney General of Lagos State and the FBIR and asked the Federal High Court (FHC) to determine which body it ought to remit the tax collected to as Eko Hotels took the view that it would be inappropriate for it to remit the tax to both FBIR[5] and LIRS[6].

On the substance of the suit, the FHC held that the VAT Act as a federal enactment had covered the field (i.e. legislated on the subject matter) which the Sales Tax Law sought to legislate on. Consequently, Eko Hotels was obligated as a taxable person to remit the tax deducted on sales to its customers to only one agency, namely the FBIR.

Dissatisfied, the Lagos State Government appealed to the Court of Appeal which dismissed the appeal and upheld the decision of the FHC.

Decision of the Supreme Court

The Lagos State Government raised five issues for determination, three of which are relevant to the topic considered.[7] The first issue challenged the applicability of the decisions of the Supreme Court in ***AG Ogun State v. Aberuagba***[8] (the *Aberuagba case*) and the Court of Appeal in ***Nigerian Soft Drinks Ltd v. Attorney-General of Lagos State***[9] (the *Nigerian Soft Drinks case*) to the instant case. The second issue urged the Supreme Court to determine the propriety of the FHC's decision that the VAT Act had covered the field of the Sales Tax Law. The third issue sought the Supreme Court's determination on whether the imposition of VAT and sales tax on one customer by two different laws in a single transaction, amounted to double taxation.

On the first issue, the Supreme Court held that the lower courts were not bound by the decisions in the *Aberuagba* and *Nigerian Soft Drinks* cases because the facts in those cases were distinguishable from the matter being considered. In the *Aberuagba case*, the issue was whether the 1982 Sales Tax Law of Ogun State, which imposed tax on certain goods brought into Ogun State, was not an item under the Exclusive Legislative List of the defunct 1979 Constitution of Nigeria which empowered the National Assembly to regulate inter-state and international trade and commerce, as well as the prices of certain goods already regulated under the

[5] Having regard to sections 1, 2, 10, 11, 12, 13, 14, 15 and 16 of the VAT Act.
[6] Having regard to sections 1, 2, 3, 4, 5 and 6 of the Sales Tax Law
[7] The fourth and fifth being a purely jurisdictional/procedural issues.
[8] [1985] 1 NWLR (Pt 3) 395.
[9] [1987] 2 NWLR (Pt 57) 444 CA.

Price Control Act, 1977 and the Price Control Commodities Order 22 of 1979. The Supreme Court in the *Aberuagba case* declared the Sales Tax Law of Ogun State unconstitutional as it apparently violated the provisions of the 1979 Constitution.

In the Nigerian Soft Drinks case, the issue was whether in the light of the Supreme Court's decision in the *Aberuagba case*, the Sales Tax Law of Lagos State was validly made, considering that it imposed sales tax on inter-state trade and commerce. The Supreme Court noted that the Court of Appeal held in that case that the Sales Tax Law of Lagos State was validly made because it was different from the Ogun State version, for while the Ogun State Law imposed ***tax on goods whose prices*** were already regulated by the Federal Government, the Lagos State Law did not impose tax on goods whose prices were regulated by the Federal Government.

On the second and third issues, the Supreme Court held that the doctrine of covering the field would apply because the VAT Act is an existing law[10] which had covered the field of the Sales Tax Law, and that it would amount to double taxation to impose VAT and sales tax on one consumer for the same goods and services. [11] Furthermore, the Supreme Court found that because the rates of VAT and sales tax are similar, "*it follows that there is unhealthy competition between the two laws, thus throwing the consumer and collection agents into confusion...*"[12] The Court decided that in the circumstance, the Sales Tax Law would remain inoperable until such a time when the VAT Act is either repealed by the National Assembly or invalidated by a court of competent jurisdiction.

The Chequered History of the Hotel Consumption Law

Section 2 of the Hotel Occupancy and Restaurant Consumption Law of Lagos State 2009 ("Hotel Consumption Law") imposes a tax of 5% on any person who "*pays for the use or possession or for the right to the use or possession of any hotel facility or events centre; or purchases consumable goods or services in any restaurant whether or not located within a hotel in Lagos State.*"[13]The goods and services covered by the Hotel Consumption Law are already liable to VAT because the VAT Act imposes VAT on all goods and services unless specifically exempted by the VAT Act; and the goods and services covered by the Hotel Consumption Law are not so exempted.

Shortly after its enactment, the validity of the Hotel Consumption Law became the subject of litigation in several courts, resulting in conflicting decisions by the State

[10] Per Kekere-Ekun, JSC at p. 149, paras. 10-20.
[11] Per Kekere-Ekun, JSC at p. 149, paras. 25-30.
[12] Per Okoro, JSC at p. 163-164, paras. 30-5; see also Kekere-Ekun, JSC at p. 149, paras. 20-25.
[13] Section 1(1) (a), (b) of the Hotel Consumption Law. See also sections of the Sections 96 and 97 of the Kano State Revenue Administration (Amendment) Law, No. 3 of 2017.It is reported that the Federal High Court sitting in Abuja recently set aside the said sections of the Kano State Law for resulting in "double taxation". See: https://www.thisdaylive.com/index.php/2018/07/23/court-sets-aside-kano-consumption-tax-law/

and Federal High Courts.[14] In 2010, the Federal Government (FGN) filed an originating summons at the Supreme Court against the Attorney-General of Lagos State challenging the validity of the Hotel Consumption Law and the Hotel Licensing Law 2003 on the basis that the said laws were inconsistent with the 1999 Constitution and the Nigerian Tourism Development Corporation Act (Tourism Act).[15]

Before the hearing of the FGN's suit, the Attorney-General of Lagos State also filed a suit at the Supreme Court challenging the validity of the Tourism Act. In two unanimous decisions,[16] a full panel of the Supreme Court on 19th July 2013 decided in favour of the Lagos State Government on the ground that the licensing and regulation of hotels and tourism are residual matters in the 1999 Constitution in respect of which the State Houses of Assembly may legislate without interference from the FGN. Although this decision effectively endorsed the power of the Lagos State Government to exclusively regulate hotels and tourism in the State, the validity of the tax imposed by the Hotel Consumption Law was not an issue before the Supreme Court and no pronouncement was made thereon.

Our Thoughts on the Supreme Court's Decision in Attorney-General of Lagos State v. Eko Hotels Limited & Anor

Sales tax is imposed on all chargeable commodities and services listed in the first column of the schedule to the Sales Tax Law.[17] Hotel consumption tax is payable on the use or possession of a hotel facility or events centre and on consumable goods and services in any restaurant within or outside a hotel in Lagos.[18] Because the goods and services liable to hotel consumption tax are already covered by the Sales

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[14] For instance, in *Mas Everest Hotels Ltd & Anor v AG Lagos State (2010) 2 TLRN 1*, Justice Oshodi of the High Court of Lagos State upheld the validity of the Hotel Consumption Law in a judgment delivered on 8th August 2009. The Plaintiffs who were hotel owners had sought a declaration that the Hotel Consumption Law was invalid by virtue of section 4(2) and (3) of the Constitution and section 1 of the Taxes and Levies (Approved List for Collection) Act ("Taxes and Levies Act") which, respectively, provide for the legislative powers of the National Assembly, and the responsibility for collecting taxes by the various tiers of government. The Court upheld an objection challenging the Plaintiffs' *locus standi* on the basis that they were not the ultimate payers of the tax. The Court also held that the Hotel Consumption Law did not encroach on either of the legislative lists in the Constitution. However, in *Princel Court Ltd v AG Lagos State and Ors (2010) 3 TLRN 30*, the Plaintiffs filed an originating summons at the Federal High Court ("FHC") challenging the validity of the Hotel Consumption Law on the ground that it was inconsistent with the VAT Act and the Taxes and Levies Act. In a judgment delivered by Ajakaiye, J., on 27th May 2010, the FHC held that the Hotel Consumption Law was null and void for being inconsistent with the Constitution, VAT Act and Taxes and Levies Act. The Court reasoned that the Plaintiffs had *locus* as operators of the affected businesses who would be made to account to two tax authorities.

[15] Cap 137 Vol. 12 LFN 2004 (formerly Decree No. 81 of 1992) See Attorney General of the Federation v Attorney General of Lagos State [2013] 16 NWLR (Part 1380) 249.

[16] AGF v AG Lagos, Suit No. SC 340/2010 [2013] 16 NWLR (Part 1380) 249, and AG Lagos v AGF, Suit No. SC 462/2010 [2013] 16 NWLR (Part 1380) 383.

[17] Section 1 of the Sales Tax Law. Taxable goods include beer; wine, liquor and spirits; cigarettes and tobacco; jewels and jewelleries; etc. Taxable services comprise sales and services in registered hotels, motels, catering establishments, restaurants and other personal services establishments.

[18] Section 1(1) the Hotel Consumption Law.

Tax Law excludes the application of sales tax to facilities or transactions covered by the Hotel Consumption Law.

VAT is payable on *all* goods and services except those listed in the first schedule to the VAT Act.[19] As a result of the large net of VAT, the goods and services taxable under both the Sales Tax Law and the Hotel Consumption Law are also liable to VAT.[20]In this regard, section 2 of the Hotel Consumption Law provides that VAT shall be excluded in the tax rate imposed by it.

Some commentators may assert that the first implication of the Eko Hotels case is that "*the VAT Act, having covered the field of sales tax,*"[21] all extant laws enacted by State Houses of Assembly imposing sales tax in the same manner as the VAT Act shall remain inoperable until such a time when the VAT Act is either repealed by the National Assembly or invalidated by a court of competent jurisdiction. Secondly, it may be argued that the Supreme Court's decision is to the effect that because the items covered and even the rates of the taxes imposed by both the VAT Act and the Sales Tax Law are similar, imposing VAT and sales tax "*on the same goods and services, payable by the same consumers under two different legislations*" would create double taxation.[22]

In effect, this decision would mean that if a federal law has imposed tax on goods and services, a State law cannot validly impose a similar tax on the same goods and services to be paid by the consumer. Accordingly, because VAT is payable on all goods and services,[23] including but not limited to hotel services and consumables in restaurants, by seeking to impose tax on already "VATable" goods and services, hotel consumption tax like sales tax creates an incidence of double taxation.

In our view, however, although the Eko Hotels case is binding on the Lagos State Government as one of the parties, it is doubtful if this would automatically translate to the inoperability of the Hotel Consumption Law, as the validity of the said Law was not one of the issues for the Supreme Court to decide. We believe that the Hotel Consumption Law will remain in operation until such a time when a court of competent jurisdiction declares it inoperable relying on the precedent set by the Eko Hotels case.[24]

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[19] Section 2 VAT Act.
[20] See Princel Court Ltd v AG Lagos State and Ors (2010) 3 TLRN 30.
[21] Per Kekere-Ekun, JSC at p. 146.
[22] Kekere-Ekun, JSC at p. 149, paras. 25-30.
[23] Subject to section 2 of the VAT Act.
[24] This occurred recently in where the Federal Court sitting in Abuja declared sections 96 and 97 of the Kano State Revenue Administration (Amendment) Law, No. 3 of 2017 null and void on the basis that the said law seeks to legislate on a field covered by the VAT Act. See https://guardian.ng/news/court-nullifies-kano-state-law-on-consumption-tax/

Comments on the Eko Hotels Case

Despite the foregoing analysis, we have identified two faulty premises in the Supreme Court's decision in the Eko Hotels case as explained below.

The Faulty Premises

Covering the Field

The Supreme Court reasoned that the VAT Act qualifies as an existing law under section 315 of the Constitution, and had therefore *covered the field* of the Sales Tax Law.

For clarity, Section 315(1) (a) of the Constitution provides as follows:

> *(1) "Subject to the provisions of this Constitution, an existing law shall have effect with such modification as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be:*
>
> *(a) An Act of the National Assembly to the extent that it is a law made with respect to any matter on which the National Assembly is empowered by this Constitution to make laws"*[25]

In the words of Kekere-Ekun, JSC[26] on this point:

> *"...At the time the cause of action arose, the VAT Act was deemed to be an Act of the National Assembly..."*

Granted that the VAT Act qualifies as an existing law pursuant to section 315(4) of the Constitution, it does not follow that every existing law enjoys automatic application. This is why section 315(1) states that such laws shall only have effect with such modification as may be necessary to bring them into conformity with the provisions of the Constitution. Accordingly, the VAT Decree will be deemed to be applicable as an Act of the National Assembly only to the extent that it is a law made *with respect to any matter on which the National Assembly is empowered by the Constitution to make laws.*

The Supreme Court failed to consider that whilst the VAT Decree may have been validly made by the Supreme Military Council in 1993, under the present federal constitutional framework, the National Assembly lacks the legislative competence to impose consumption tax on a country-wide level under the Constitution. [27] A perusal of Parts 1 and 2 of the Second Schedule to the Constitution will show that tax on consumption is not an item on either of the legislative lists. This should

[25] At p. 145; underlining supplied for emphasis

[26] At p. 146, paras. 15-30.

[27] It is argued that the VAT Act may be validly made by the National Assembly to apply in the Federal Capital Territory (FCT); in respect of transactions with the Federal Government or any of its agencies; etc. A similar explanation was offered by I.T. Muhammad, JSC in AGF v AG Lagos at 351, para. H on the Tourism Act, an existing law which His Lordship held could apply in the FCT but not across the Federation.

make VAT a residual matter on which only the respective state governments (not the federal government) are empowered to legislate.[28]

Justice Kekere-Ekun also stated[29] that:

> *"...the goods and services covered by both legislation[30] are the same. It follows that the VAT Act has effectively covered the field in that regard. Section 7(1) of the Act provides that the tax shall be administered by the 2nd Respondent.[31] In the circumstances, I am in complete agreement with the court below...that the VAT Act having covered the field on the issue of sales tax, its provisions prevail over the provisions of the Sales Tax Law of Lagos State. Thus even if the House of Assembly has the requisite legislative competence to enact the Sales Tax Law, which is not an issue before us, once an existing federal law or an Act of the National Assembly has covered the field, the Act of the National Assembly or such existing law must prevail..."*

With respect, this view is alien because the doctrine of covering the field only applies to those matters in respect of which both the National Assembly and the House of Assembly of a State have concurrent legislative powers.[32]These matters are listed in Part 2 of the Second Schedule to the Constitution. Consequently, where the National Assembly has *validly* legislated on any of them *conclusively*[33]there is nothing left for a State Assembly to legislate on in that regard.

In ***AGF v AG Lagos State***, [34]the Supreme Court held that the doctrine of covering the field does not apply to residual matters, as those are in fact within the exclusive legislative competence of the State Assembly. Similarly, in ***AG Ogun State v Aberuagba***, the Supreme Court emphatically made the point that the federation has no powers to make laws on residual matters.[35]

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[28] According to Ngwuta, JSC: "*Matters included in the Exclusive List are within the exclusive domain of the National Assembly to legislate upon. See s. 4(3). In addition to its power to legislate in matters in the Exclusive List exclusively, the National Assembly is also empowered to legislate, though not exclusively, on matters in the Concurrent Legislative List. Residual Matters which are matters not in either Exclusive or Concurrent Lists are matters within the exclusive competence of the states to legislate upon. See AG Abia State v AG Federation (2006) 16 NWLR (Part 1005) 265 at 380-381, paras. D-C...*"

[29] At p. 146, paras. 15-30.

[30] That is, the VAT Act and the Sales Tax Law.

[31] That is, the FIRS.

[32] See AG Ogun State v AGF (1982) 1-2 SC (Reprint) 7 at 57-58 paras.35-5.

[33] That is, with the intent that the federal statute shall cover the field with no room for any further legislation by States on the matter: see Priggs v Pennsylvania (1842) 16 Pet at 617-618; see also per Dixon, J in *Ex parte* Mchean (1930) 43 CLR 472 at 483.

[34] (Supra) 362, paras. F-H.

[35] [1985] 1 NWLR (Part 3) P. 395; interestingly, this case was cited by counsel in the Eko Hotels case. See also ***AG Abia State v AG Federation*** [2006] 16 NWLR (Part 1005) 265 at 381, para. B.

Double Taxation

The Supreme Court's decision was also premised on the fact that VAT and Sales Tax ought not to be paid by one consumer because this would amount to double taxation. It should be pointed out that as inequitable as it may seem, a person may validly suffer double or indeed multiple taxation unless excluded by law. This is reflected in how courts by virtue of section 19 of the Companies Income tax Act (CITA), have subjected dividends, which exceed the profits of a company in the year the dividends were declared, to income tax, regardless of the fact that the dividends were paid from retained earnings that had been taxed previously.[36]

Even in the U.S., where federalism is also practised, federal and state taxes are completely separate and each tier of government has its own authority to charge taxes. Within a state, there may be several jurisdictions such as counties or towns who may charge their own school taxes in addition to state taxes.[37]

Consequently, we opine that nothing in the Constitution prohibits States from imposing levels of taxes on corporates and individuals so long as this does not encroach on the taxing powers of the Federal Government in the Exclusive Legislative List.

Therefore, we feel that the Supreme Court's reasoning that sales tax and VAT amount to double taxation was at best borne out of the sentiments of the learned justices especially as no statutory authority was cited to support this view.

Conclusion

In the final analysis, it is our view that the Eko Hotels case is not good law on the application of the doctrine of covering the field nor does it furnish a good precedent on the legality or otherwise of double taxation. Also, although it would have been good for certainty if the Supreme Court had pronounced on the constitutionality of the VAT Act; the Court did not do so understandably, because this was not an issue for determination in the case. It is therefore hoped that the opportunity would present itself sooner than later for Nigeria's apex court to not only rectify the errors identified in its decision in this case, but also finally lay the VAT conundrum to rest.

[36] See 19 of the Companies Income Tax Act (CITA) and the Oando v FIRS (2016) 26 TLRN 1.

[37] See https://www.rpi.edu/dept/advising/free_enterprise/us_government/taxation.htm

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